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PP v. SOHA BETA & ANOR

HIGH COURT SABAH & SARAWAK, MIRI
MAIRIN IDANG JC
[CRIMINAL TRIAL NO: MYY-45B-2-7-2014]
1 NOVEMBER 2018

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CRIMINAL LAW: Penal Code – Section 302 – Offence of murder – Accused persons charged for murder of baby – Baby found buried – Prosecution relied on circumstantial evidence to build case against accused persons – Whether cumulative effect of circumstantial evidence led to irresistible conclusion that accused persons committed crime – Whether defence of accused persons cast reasonable doubt on prosecution’s case – Whether there was common intention between accused persons to murder baby

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CRIMINAL LAW: Penal Code – Section 34 – Common intention – Accused persons charged for common intention of murdering baby – Baby found buried – Whether there was evidence of existence of pre-concert or pre-planning to murder baby – Whether there were plans that preceded act that constituted offence – Whether there was common intention between accused persons to murder baby

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The first accused had consensual sex with his sister in law, the second accused, and this led to the birth of a baby. After giving birth to the baby at the Miri General Hospital (‘MGH’), the accused persons took a bus. The first accused then persuaded the second accused to give the baby up for adoption and when she refused, the former took the baby from the latter and disappeared. When he returned 20 minutes later, the first accused told the second accused that he had given the baby to an Indonesian couple. The accused persons were arrested and subsequently charged for the murder of the baby under s. 302 of the Penal Code (‘PC’), read together with s. 34 of the same Code (‘the original charge’). It was the prosecution’s case that the accused persons, in furtherance to their common intention, had asphyxiated the baby by burying him alive, at a plantation, with the intention to kill him. The prosecution adduced circumstantial evidence that (i) the MGH stated the baby was healthy when discharged; (ii) a security guard (‘PW13’) saw a male and a female, carrying something in ‘kain batik sarong’, entering a plantation and coming out from the bushes empty-handed; (iii) PW13 discovered the baby buried at the place where the male and female persons had earlier gone into; and (iv) the DNA analysis confirmed the accused persons were the biological parents of the baby. During an identification parade, PW13 identified the male person as the first accused but not the female person. At the close of the prosecution’s case, it was found that the baby was already dead when buried. The accused persons were discharged and acquitted on the charge of murder. However, there was a *prima facie* case against the accused persons under s. 318 of the PC and the prosecution was directed to frame a

charge against the accused persons under the same. The prosecution appealed to the Court of Appeal and the appeal was allowed; the case was remitted back to the High Court with an order that the accused persons be called to enter their defence on the original charge. In their unsworn statements, the accused persons denied burying the baby alive and killing him and averred that the accused had given the baby to an Indonesian couple.

Held (convicting first accused and sentencing him to death; acquitting and discharging second accused):

- (1) There was no direct evidence from witnesses who saw that it was the accused persons who had killed the baby or that they buried the baby alive which caused his death. In the absence of direct evidence, the prosecution had to resort to adducing circumstantial evidence to discharge its burden. A conviction based on circumstantial evidence is good in law if the cumulative effect of all evidence leads to an irresistible conclusion that it was the accused who committed the crime. (paras 17 & 18)
- (2) The accused persons were the last persons who were with the baby from the time of the discharge from the MGH and whilst on the bus. Both unsworn statements supported this view. However, having alighted from the bus, the first accused had taken the baby by force from the second accused. The first accused then disappeared for a good 20 minutes. The first accused was the last person to be with the baby for the duration of the 20 minutes. PW13 said he recognised the male person as the first accused but not the female person. The defence put forward by the first accused failed to create any reasonable doubt on the prosecution's case. The prosecution had proven its case beyond reasonable doubt that only the first accused was involved in the death of the baby by burying him at the burial site. (paras 12, 31 & 47)
- (3) The prosecution had not proven, beyond reasonable doubt, that the second accused was involved in the death of her baby. The DNA found on her clothing was to be expected as she was, after all, the baby's mother and she had touched and cuddled the baby. The second accused was not the female person with the first accused at the crime scene. PW13 did not identify her at the crime scene, the identification parade and during dock identification. The defence of the second accused raised a reasonable doubt on the charge preferred against her. Furthermore, there was no evidence showing the existence of pre-concert or pre-planning, bearing in mind that the crucial test is that such plan must precede the act constituting an offence. (paras 12, 43, 46 & 47)

A Case(s) referred to:

Abdul Rashid Abdul Wahab lwn. PP [2016] 1 LNS 1310 HC (refd)

Abu Bakar Imam Idris v. PP [1947] 1 LNS 1 HC (refd)

Arumugam Muthusamy v. PP [1998] 3 CLJ 597 FC (refd)

Balachandran v. PP [2005] 1 CLJ 85 FC (refd)

Chan Chwen Kong v. PP [1962] 1 LNS 22 CA (refd)

B *Chang Kim Siong v. PP [1967] 1 LNS 18 FC (refd)*

Chukwudi Hassan lwn. PP [2015] 8 CLJ 353 CA (refd)

Dato' Mokhtar Hashim & Anor v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC (refd)

Dato' Seri Anwar Ibrahim v. PP & Another Appeal [2015] 2 CLJ 145 FC (refd)

Jayaraman Velayuthan & Ors v. PP [1982] CLJ 464; [1982] CLJ (Rep) 130 FC (refd)

Karam Singh v. PP [1967] 1 LNS 65 FC (refd)

C *Lee Kwai Heong & Anor v. PP [2006] 1 CLJ 1043 CA (refd)*

Low Kian Boon & Anor v. PP [2010] 5 CLJ 489 FC (refd)

Mohd Razaly Rahmad v. PP [2015] 2 CLJ 574 HC (refd)

Muhammad Isa Aris & Ors v. PP [2011] 3 CLJ 510 CA (refd)

Nanda Kumar K Kaliapan v. PP & Another Appeal [2015] 2 CLJ 670 CA (refd)

D *Ong Poh Cheng v. PP [1998] 4 CLJ 1 CA (refd)*

Ouseng Sama-Ae v. PP [2010] 6 CLJ 416 CA (refd)

PP v. Cheah Chong Tatt & Anor [2017] 1 LNS 575 HC (refd)

PP lwn. Ho Sek Kong [2006] 5 CLJ 49 HC (refd)

PP v. Magendran Mohan [2005] 3 CLJ 592 HC (refd)

PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC (refd)

E *Rex v. Vincent Banka & Anor [1936] 1 LNS 62 PC (refd)*

Sunny Ang v. PP [1965] 1 LNS 171 FC (refd)

Legislation referred to:

Penal Code, ss. 34, 302, 318

For the prosecution - Musli AB Hamid; DPP

F *For the accused - Ranbir Singh; M/s Ranbir S Sangha & Co Advocs*

Reported by Najib Tamby

JUDGMENT**G****Mairin Idang JC:**

[1] The accused here are Soha Beta and Herna Molla and they are charged as follows:

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Bahawa kamu pada 26 November 2013, jam lebih kurang 3.30 petang, bertempat di Lereng bukit, Jalan Ladang Alamwasa Sdn Bhd, Suai, Batu Niah, di dalam Daerah Miri, di dalam Negeri Sarawak, bagi mencapai niat bersama kamu telah membunuh seorang bayi lelaki (tiada nama), dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan dan dibaca bersama seksyen 34 Kanun yang sama.

I

[2] The prosecution had called 20 witnesses. For the defence, both accused gave unsworn statements. For ease of reference and where appropriate I shall also refer to Soha Beta as A1 and Herna Molla as A2.

[3] At the close of its case, the prosecution submitted that the ingredients which it needed to prove are as follows:

- (i) the baby of the accused had died;
- (ii) the baby of the accused had died due to asphyxia; and
- (iii) both accused in furtherance of their common intention had asphyxiated their own newborn baby by burying him alive on 26 November 2013 at Ladang Alamwasa with the intention to kill him.

[4] The brief facts of the case are these. A2 is the sister-in-law of A1, he being married to A2's elder sister. A1, his wife and A2 were all working in the same oil palm estate at Ladang Sawit SOP Plantation Suai. A1 and A2 had a consensual sex which led to the birth of a baby boy. A2 gave birth at the Miri General Hospital ('MGH'). Upon discharged from MGH, A1, A2 and the baby took a bus until it stopped at Simpang Ngu, Niah. A1 persuaded A2 to give the baby for adoption but she refused. Eventually, A1 had to take the baby by force from A2. A1 then disappeared with the baby and after 20 minutes or so came back to where he had left A2. A1 told A2 that he had given the baby to an Indonesian couple. They then boarded a bus towards Ladang Sungai Pandan 4. Ladang Sungai Pandan 4 is where they were arrested and subsequently charged for the murder of the baby.

[5] At the close of the prosecution case, the learned DPP submitted that a *prima facie* case had been made out and urged upon the court to call upon both accused to enter their defence. Learned counsel for the accused ('learned counsel') submitted otherwise and had called for the discharge and acquittal of both accused. I was reminded of the steps to be observed by the court at the close of the prosecution case, which had been summarised in *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 (FC) and what constitute a *prima facie* case which had been described in *Balachandran v. PP* [2005] 1 CLJ 85; [2005] 1 AMR 323 (FC).

[6] What *Mohd Radzi* and *Balachandran* tell us are this. That in deciding whether there is a *prima facie* case, the court must subject the prosecution's evidence to a maximum evaluation to determine whether all the essential ingredients have been proven. In doing so, the court is required to test, scrutinise and evaluate the prosecution's evidence thoroughly from all angles. It is also a test of credibility and reliability of the prosecution evidence.

- A [7] I read through the evidence adduced by the prosecution for the purpose of deciding whether there was a *prima facie* case, it was my finding that the prosecution had not proven ingredient 3, namely that ‘both A1 and A2 in furtherance of their common intention had asphyxiated their own new born baby by burying him alive on 26 November 2013 at Ladang Alamwasa with the intention to kill him’. I was of the view that the baby was already dead before he was buried at Ladang Alamwasa on 26 November 2013 (the burial site). I made my finding after considering the evidence of PW13 (Titus Farneubun, the security guard employed by Alamwasa Plantation Sdn Bhd) and PW19 (Dr Jamil bin Dolkadir, the pathologist).
- B
- C [8] I did not accept the evidence of PW13 where he allegedly heard the baby’s cries after the accused had left the burial site some ten minutes or so. I was of the view that the baby would die instantly upon burial, as such, PW13 could not have heard the baby’s cries after ten minutes. My view is supported by PW19’s evidence that the baby could not have cried once buried. However, in ruling that the accused were involved in burying a dead baby, I took into account the presence of their DNA on the exhibits (green and white cloths printed with words ‘Untuk Kegunaan Hospital Sahaja’ found wrapping the body of the baby underneath the soil) recovered from the baby. The chemist’s report (P42) had shown the accused and the baby profiles were present in the exhibits recovered from the baby. This showed that both the accused were the last persons to be with the baby from the time of A2 discharged from the Miri General Hospital up to the time of their arrest.
- D
- E
- F [9] As it was my view that the baby was already dead when buried, I then discharged and acquitted both accused on the charge of murder under s. 302 of the Penal Code. However, it was my finding that there is a *prima facie* case against the accused under s. 318 of the Penal Code and directed the learned DPP to frame a charge against both accused under s. 318 of the Penal Code. But the prosecution appealed. The Court of Appeal (‘COA’) allowed the appeal and remitted the case back to the High Court with an order that both accused were to be called upon to enter their defence on the original charge of murder.
- G
- H [10] At the continuation of trial on 23 November 2017, learned counsel for the accused informed the court that he had briefed the accused (through an Indonesian interpreter, Mr Lucky Nugrahan passport No D037199) of the three options namely, to give sworn evidence from the witness box which means they would be liable to cross-examination by the prosecution or to give unsworn statement from the accused dock which means they would not be cross-examined or to remain silent. Both accused chose to give unsworn statement from the accused dock. Learned counsel also informed the court that the defence would not be calling any other witness. Learned counsel then
- I tendered the accused’s notice of defence of alibi which were marked as D1 and D2 respectively.

[11] Both accused had prepared written statements which were translated to English by the Indonesian interpreter, Mr Lucky Nugrahan: A

A1's statement is as follows:

1. Herna Molla and I left Miri General Hospital with the baby after both were discharged from the hospital on 26 November 2013. We left the Hospital at about 12 midday. Our intention was to go back to our work place at Ladang Sawit SOP Plantation Suai. I had also paid the sum of RM1080.00 for the hospital charges. As we were on the journey home to the Plantation, I received a phone call from Tuan Michael who is one of the Manager at the Plantation. He asked if the baby that Herna gave birth to is mine or not. I admitted that the baby is mine due to the fact that we had a consensual affair. He then said that I am not allowed to go back to the Plantation because the other Indonesian workers were angry with me about the affair and the birth of the baby and that at the very least we would be beaten up. B C
2. We took a taxi to the Bus terminal at Miri and from there we took a bus bound for the Plantation at Suai the bus had stopped at Simpang Ngu, Niah. There I tried to convince Herna Molla that we had to give up the baby to any one at Simpang Ngu but she refused. I took the baby from her by force and went to another part of Simpang Ngu, Niah where there were many stalls. I waited near the stalls for about 15 minutes while I tried to get anybody to take the baby. Finally, I met a couple that were Indonesian as well and I convinced them to take the baby and they did. After that I went back to where Herna Molla was standing and we both took another bus to a different Plantation which was known as Ladang Sungai Pandan 4, where we hoped to make a fresh start in the hope that nobody would know us and I also called my wife and told her to meet us at the new Plantation. D E F
3. I did not bury the baby and kill the baby. At the time of the alleged offence which is about 3.30 pm on 26 November 2013, Herna Molla and I were in a bus on the Miri-Bintulu Road somewhere after Simpang Ngu junction and we were on our way to Ladang Sungai Pandan 4. Ladang Sungai Pandan 4 is the place where we were arrested and we had surrendered voluntarily. G

That is all I have to say.

A2's statement is as follows: H

1. I did have an affair with Soha Beta. I did not even know I was pregnant until I started having labour pains and only then I was told by the nurse at the Ladang Sawit SOP Plantation, Suai that I was pregnant. I was then taken to Miri General Hospital where I delivered the baby. I

- A 2. On 26 November 2013 at about 12 midday I was discharged with the baby and Soha Beta and I together with the baby took a taxi to the bus terminal from where we boarded a bus. Initially before boarding the bus we had intended to go back to Ladang Sawit SOP Plantation, Suai but then Soha Beta told me that the Indonesian workers there were threatening us and we then decided to go to another Plantation by bus. When the bus reached Simpang Ngu at B Niah we got off the bus for what I thought would be a lunch break instead once we got off the bus Soha Beta told me that we had to give up the baby, I disagreed but he took the baby by force from me and then he went towards an area with many market stalls. I could not see him from the place where I was standing. I just waited there and cried. He came back after about 20 minutes and told me he had given the baby up for adoption to an Indonesian couple. Then we took a different bus towards a new Plantation which was known at that time as Ladang Sungai Pandan 4, where Soha Beta said we would find new jobs. Soha also made arrangements for my sister to join us at the place.
- C
- D 3. I had no part to play in the death or adoption of the baby. At the time of the alleged offence which is about 3.30pm on 26 November 2013, Soha Beta and I were in a bus on the Miri-Bintulu Road somewhere after Simpang Ngu junction and we were on our way to Ladang Sungai Pandan Ngu junction and we were on our way to Ladang Sungai Pandan 4. Ladang Sungai Pandan 4 is the place where we were arrested and we had surrendered voluntarily.
- E

That is all I have to say.

- [12] At the close of the defence case, I directed both the prosecution and the accused to file their respective submissions concurrently on or before 8 December 2017 and to reply, if any, by 15 December 2017. On 29 January 2018, I delivered my decision where I found that the prosecution had proven its case beyond reasonable doubt that only A1 was involved in the death of the baby by burying the baby at the burial site. As for A2, the prosecution had not proven beyond reasonable doubt that she was involved in the death of her baby. Herein are my reasons.
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- G

- [13] The prosecution submitted, by virtue of the order of the COA, the trial judge must have due regards to the findings and rulings of the COA as if those findings and rulings of the COA had been made by the trial judge himself at the close of the case for the prosecution. The prosecution submitted ‘... it goes without saying that the Court of Appeal had agreed with the prosecution that both accused persons were present at the crime scene ie at Lereng Bukit, Jalan Ladang Alamwasa Sdn Bhd, Suai, Batu Niah, Miri, Sarawak on 26 November 2013 at about 3.30pm and caused the death to the deceased ...’. The prosecution had referred to *Ouseng Sama-Ae v. PP* [2010] 6 CLJ 416.
- H
- I

[14] The prosecution also submitted on the duty of the accused which is to cast a reasonable doubt on the prosecution case and that the accused are not required to prove his innocence (see *PP lwn. Ho Sek Kong* [2006] 5 CLJ 49, *PP v. Magendran Mohan* [2005] 3 CLJ 592).

A

[15] The defence submitted ‘... there were no grounds of decision given by the Court of Appeal, as such we are left guessing as to why both accused were ordered to enter their defence’. The defence went on to submit ‘... the only reasons for the Court of Appeal to have called upon both accused to enter their defence must be because they were the last persons seen with the child upon their discharge from Miri General Hospital by the prosecution witness and because of the presence of DNA of the first and second accused on the exhibits recovered from the child amongst those of other unidentified persons’.

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[16] The submission of both the prosecution and the defence is simply this. Since the prosecution’s appeal was allowed by the COA, a *prima facie* case had been made out and therefore both accused are called to enter their defence.

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[17] Had the prosecution proven its case beyond reasonable doubt or was there a reasonable doubt raised by the accused. I start by stating that there was no direct evidence from witnesses that saw it was the accused who had killed the baby or that they had the baby buried alive which caused his death. In the absence of direct evidence, the prosecution has to resort to adducing circumstantial evidence to discharge its burden.

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[18] The principles governing the acceptance of circumstantial evidence to convict an accused have been laid down in numerous cases and that a conviction based on circumstantial evidence was good in law if the cumulative effect of all evidence leads to an irresistible conclusion that it was the accused who committed the crime (see *Sunny Ang v. PP* [1965] 1 LNS 171; [1966] 2 MLJ 195; *Jayaraman Velayuthan & Ors v. PP* [1982] CLJ 464; [1982] CLJ (Rep) 130; [1982] 2 MLJ 306; *PP v. Magendran Mohan* [2005] 3 CLJ 592; *Chan Chwen Kong v. PP* [1962] 1 LNS 22; [1962] 1 MLJ 307; *Karam Singh v. PP* [1967] 1 LNS 65; [1967] 2 MLJ 25; *Chang Kim Siong v. PP* [1967] 1 LNS 18; [1968] 1 MLJ 36).

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[19] In *Dato Mokhtar Hashim & Anor v. PP* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101; [1983] 2 MLJ 232 at p. 113 (CLJ); p. 275 (MLJ) Abdoolcader FJ (as he then was) stated as follows:

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Where circumstantial evidence is the basis of the prosecution case, the evidence proved must irresistibly point to one and only conclusion, the guilt of the accused, but in the case tried without a jury the failure by the court to expressly state this is not fatal and it would suffice if it merely says that it is satisfied as to the guilt of the accused beyond reasonable doubt (see *Jayaraman & Ors v. PP* [1982] 2 MLJ 306; [1979] 1 LNS 36).

I

A [20] In *Chang Kim Siong*, *supra* the Federal Court had emphasised that:

The onus on the prosecution where the evidence is of a circumstantial nature is a very heavy one and that evidence must point irresistibly to the conclusion of the guilt of the accused. If there are gaps in it, then it is not sufficient.

B [21] In *Karam Singh*, *supra* HT Ong FJ stated:

... In a case where the prosecution relies on circumstantial evidence, such evidence must be inconsistent with any other hypothesis than that of the guilt of the accused ...

C [22] In *Sunny Ang* the Federal Court noted:

... The second question to which I must draw your attention is that in this case, depending as it does on circumstantial evidence, is whether the cumulative effect of all the evidence leads you to the irresistible conclusion that it was the accused who committed this crime. Or is there some reasonably possible explanation such, for example – was it accident?

D [23] Thomson CJ's comments in *Chan Chwen Kong* were in the following terms:

... where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. The real question is: is that rope strong enough to hang the prisoner?

E [24] So much on the jurisprudence of circumstantial evidence. What then are the circumstantial evidence here? I am of the view they would include: the evidence from the Miri General Hospital ('MGH') which showed the baby was healthy when discharged, but about 48 hours later the baby was found dead buried underneath the soil; PW13 saw and recognised A1 together with a female person carrying something in a 'kain sarong batik' entering Ladang Alamwasa Sdn Bhd (plantation) from the main road facing towards PW13's guard house and then made a right turn to the bushes where the baby was subsequently discovered; ten minutes or so, PW13 saw A1 and the female person coming out from the bushes no longer carrying anything walking towards the main road; PW13 discovered the baby buried at the place where A1 and the female person had earlier gone into; green and white clothing (the clothing) printed with words 'Untuk Kegunaan Hospital Sahaja' were also found wrapping the body of the baby underneath the soil; the DNA analysis conducted confirmed that A1 and A2 were the biological parents of the baby, the DNA of A1, A2 and others were found on the clothing, the DNA of the baby was also detected on the clothing worn by A1 and A2. I will discuss more of this later.

I

[25] But what is the accused's defence. A1 and A2 did not call any witnesses but both had given their respective unsworn statements. Their unsworn statements are quite similar and having read the same, they are not totally bare denial as alleged by the prosecution. In A1's unsworn statement, he admitted he is the father of the baby due to a consensual sex with A2. After A2 gave birth to the baby, she was discharged from MGH on 24 November 2013. A1, A2 and the baby then boarded a bus and left MGH around midday or so. At Simpang Ngu, Niah, they got off the bus, A1 took the baby from A2 by force as A1 wanted to give the baby for adoption. A1 then disappeared and came back later to where he had left A2 without the baby. Both A1 and A2 were arrested at Ladang Sungai Pandan 4. A2's unsworn statement is this. She and A1 had a consensual sex which led to the birth of the baby. She was discharged from MGH on 24 November 2013 at about 12 midday. She, the baby and A1 then boarded a bus and when the bus reached Simpang Ngu at Niah they got off the bus. A1 told A2 to give up the baby for adoption but A2 disagreed. A1 took the baby by force from A2 and left her. A1 came back after about 20 minutes and told A2, he had given the baby up for adoption to an Indonesian couple. At Ladang Sungai Pandan 4, A1 and A2 were arrested. It is clear that the accused's defence is that they had given the baby to the Indonesian couple for adoption and having done so they did not know what happen to the baby.

[26] What is the status of unsworn statement? The prosecution asked '... is there any value to be attached to their own unsworn evidence?'. The prosecution submitted '... since both accused person didn't have the courage to give sworn evidence from the witness box and also refused to tender their statement recorded by the police during investigation, this honourable court should not give much weight to the unsworn evidence put forward by both accused'. The prosecution also submitted that the unsworn statements of the accused are mere denial and had referred to the case of *Dato' Seri Anwar Ibrahim v. PP & Another Appeal* [2015] 2 CLJ 145 (FC) where it was held: '[12] While it is within the appellant's right to give a statement from the dock, that statement must amount to a credible defence. A mere denial does not amount to credible defence'.

[27] Learned counsel had referred to the case of *PP v. Cheah Chong Tatt & Anor* [2017] 1 LNS 575; [2017] MLJU 579 where it was held as follows:

As to the value and implications of an evidence given through an unsworn statement from the dock, I can do no better than to cite the judgment of Zulkefli Ahmad Makinudin J (now PCA) in the case of *Public Prosecutor v. Mohd Amin Mohd Razali & Ors* [2002] 5 CLJ 281. In that landmark case, His Lordship stated the following:

A The position in law is that the right of an accused person to make
an unsworn statement from the dock is a substantive right.
However we must bear in mind that statement from the dock is
not sworn evidence, which can be the subject of cross-examination.
Not so much weight can be given to what the accused said in the
dock when compared to what the accused would give under sworn
B evidence. This is so because when a man gives evidence one can
cross-examine him and test his evidence and generally have a
better opportunity of assessing him. Nevertheless the law is very
clear that the court cannot outright reject such evidence. The court
must consider it and give it such weight for what it is worth and
C think fit having regard to the evidence adduced as a whole before
the court.

[28] I have read both *Dato' Seri Anwar Ibrahim* and *Mohd Amin Mohd Razali*
and what they entail is this, that the 'unsworn statement must amount to a
credible defence' and 'the court must consider it and give it such weight for
what it is worth and think fit having regard to the evidence adduced as a
D whole before the court'.

[29] Coming back to the circumstantial evidence, are they of any help to
the prosecution? Do they point to the guilt of the accused? There is of course
no issue that due to a consensual sexual liaison between the accused, A2 gave
E birth to the baby at the MGH. I have no doubt that the hospital staff had
wrapped the baby with green and white clothing which had these printed
words 'Untuk Kegunaan Hospital Sahaja'. A1 and A2 had also touched or
carried their baby when they were at MGH and also when they were on the
bus on the way to Simpang Ngu, Niah as evidence of their DNA on the
F clothing. To me, this baby that A2 had given birth to at MGH and later found
buried was the same baby. But the chemist's report (P42) on DNA also
showed other contributors other than the accused. Learned counsel therefore
submitted the presence of other contributors supports and corroborates the
defence's contention that the Indonesian couple had indeed adopted the baby.
G Should I therefore accept the defence's contention that due to the presence
of other people's DNA on the clothing, the accused had nothing to do with
the death of the baby.

[30] The question that may be asked is this. Did A1 really give the baby
to the Indonesian couple for adoption? Both accused had stated so in their
H respective unsworn statements. On reading A2's unsworn statement, it was
actually A1 who told A2 that they had to give the baby for adoption. So it
was more of A1's decision and he was all out to do it, because when A2
refused, he had taken the baby by force leaving A2 crying. A1 then
disappeared and returned after 20 minutes and told A2 that an Indonesian
couple had adopted the baby. But here is my concern, A1's statement the
I baby was given for adoption is made in the unsworn statements. I am of

course conscious of *Dato' Seri Anwar Ibrahim* and *Mohd Amin Mohd Razali*. I would have preferred a statement to that effect in A1's cautioned statement. It has been held that an exculpatory cautioned statement represents an accused person's first disclosure of his defence while under investigation. If it contains the necessary particulars that support his innocence, the cautioned statement is the accused's '*Alcontara* notice' and it carries great weight. Investigation must be carried out on the disclosure and the onus is shifted to the prosecution to rebut the same. In *Chukwudi Hassan Iwn. PP* [2015] 8 CLJ 353, *Dato' Abdul Rahman Sebli JCA* had this to say: 'If the cautioned statement of the appellant was accepted as true by the trial judge, the appellant was definitely entitled to an order of discharge and acquittal because without the evidence of knowledge, the appellant did not commit any offence'. But there was no cautioned statement tendered here which would support the alleged adoption of the baby by the Indonesian couple. Such necessary weight could have been given to a tendered cautioned statement; they being contemporaneously made.

[31] There is issue on when A2 and the baby were discharged from MGH. PW15 (Marilyn Sahek) and PW14 (Dr Rizal) had testified that A2 and the baby were discharged from MGH on 24 November 2013. Learned counsel submitted otherwise relying on the testimony of PW8. But in cross-examination PW8 said 25 November 2013 (p. 152 NOP) and also 26 November 2013 (p. 161 NOP), so which is which. Having analysed the evidence, I can rely on the evidence of PW15 and PW14, they had spoken from the records of the hospital. The main issue here is the afternoon of the 26 November 2013. Learned DPP submitted the accused were the last persons to be with the baby. I agree with the learned DPP that the accused were the last persons with the baby only from the time of the discharge from MGH and whilst in the bus up to Simpang Ngu at Niah. Both unsworn statements of the accused support this view. But having alighted from the bus, A1 had taken the baby by force from A2. A1 then disappeared for a good 20 minutes. A1 to me was the last person to be with the baby for the duration of the 20 minutes. Now coincidentally between 3-3.30pm, PW13 who was the security guard of the plantation saw a male and female persons entering the plantation from the main road facing towards the plantation's guard house. PW13 saw the female person carrying something in a 'kain sarong batik'. PW13 saw them made a right turn to the bushes (where the baby was subsequently discovered). After ten minutes or so, PW13 again saw these two persons coming out from the bushes walking towards the main road but the female person was no longer carrying anything. PW13 said he recognised the male person as A1 but not the female person. During the ID parade, PW13 had also identified the male person as A1 but not the female person. PW13 also identified A1 at the dock but not A2.

A [32] Learned counsel took issue on the PW13's identification of A1 at the crime scene. He said, PW13 had identified some other male as being near the crime scene on 26 November 2013 together with a female person carrying a baby. Learned counsel had referred to the court's observation at p. 257 of the NOP that only the figure of a male and female can be observed and not the facial features. But PW13 in his evidence said he could clearly see the male face but not the female (QA5523 and 5527 NOP). PW13 said the distance from the guard house to where the two persons were coming from was about 70 meters (QA 5477 NOP) and when they reached the pond before turning to their right, they were 30-40 metres away from where he was (QA 5483 NOP). It was also in the afternoon that PW13 saw these two persons and the visibility was good from the guard's house. Although I made such observation on the facial features, PW13's evidence was that he could see A1's face clearly. In fact, PW13 saw the two persons emerging from the main road until they turn right and went to the bush. I am of the view PW13 had some good observation of the two persons. It was not a case of a fleeting glance.

[33] When we speak of the identification of an accused person, then the 'Turnbull guidelines' comes into mind. This was discussed at length in the case of *Mohd Razaly Rahmad v. PP* [2015] 2 CLJ 574:

E The *Turnbull* guidelines were reformulated into a three step test by the Singapore Court of Appeal in the case of *Heng Aik Ren Thomas v. Public Prosecutor* [1998] 3 SLR 465 and referred to recently by the Federal Court in the case of *Duis Akim & Ors v. PP* [2013] 9 CLJ 692; [2014] 1 MLJ 49 in a passage that bears useful reproduction:

F To begin it is in the forefront of our minds the *Turnbull* guidelines (*R v. Turnbull* [1976] 3 All ER 549) as succinctly summarised in the case of *Heng Aik Ren Thomas v. Public Prosecutor* [1998] 3 SLR(R) 142. Delivering judgment for the Singapore Court of Appeal M Karthigesu JA said this at paras 33-35 of the judgment:

G Although the *Turnbull* guidelines were drafted to assist a trial judge in correctly directing the jury, the principles which were enunciated in it are of equal relevance to our criminal trial system. In adapting the *Turnbull* guidelines for our local system, we have reworked the *Turnbull* guidelines into the following three-step test. The first question which a judge should ask when encountering a criminal case where there is identification evidence, is whether the case against the accused depends wholly or substantially on the correctness of the identification evidence which is alleged by the defence to be mistaken. If so, the second question should be this. Is the identification evidence of good quality, taking into account the circumstances in which the identification by the witness was made? A non-exhaustive list of factors which could be considered

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include the length of time that the witness observed the accused, the distance at which the observation was made, the presence of obstructions in the way of the observation, the number of times the witness had seen the accused, the frequency with which the witness saw the accused, the presence of any special reasons for the witness to remember the accused, the length of time which had elapsed between the original observation and the subsequent identification to the police and the presence of material discrepancies between the description of the accused as given by the witness and the actual appearance of the accused. In considering the circumstances in which the identification was made, the judge should take note of any specific weaknesses in the identification evidence. If after evaluation of the identification evidence, the judge is satisfied that the quality of the identification is good, he may then go on to safely assess the value of the identification evidence. Where the quality of the identification evidence is poor, the judge should go on to ask the third question. Is there in any other evidence which goes to support the correctness of the identification. If the judge is unable to find other supporting evidence for the identification evidence, he should then be mindful that a conviction which relies on such poor identification evidence would be unsafe. The supporting evidence need not be corroboration evidence of the kind required in *R v. Baskerville* [1916] 2 KB 658. What the supporting evidence has to be is evidence that makes the judge sure that there was no mistake in the identification.

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[34] In *Heng Aik Ren Thomas*, *supra*, the Singapore Court of Appeal had reformulated the *Turnbull* guidelines into three-step test and they are: (i) whether the case against the accused depends wholly or substantially on the correctness of the identification evidence which is alleged by the defence to be mistaken; (ii) if so, is the identification evidence of good quality, taking into account the circumstances in which the identification by the witness was made; and (iii) where the quality of the identification evidence is poor, is there any other evidence which goes to support the correctness of the identification.

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[35] Learned counsel also took issue on the conduct of the ID parade by the police. He said there were defects in the ID parade that makes it inadmissible or at the very least unreliable. The defence had listed several unsatisfactory issues and they basically relate to the facial features, height, race, complexion and built of the participants of the ID parade; failure to inform the accused to have his lawyer present during the ID parade; failure to record it in P19; duty to record the method of identification in P19; to produce and tender the document which had the writing in pen on it; the statement 'Sama ada saksi diberitahu untuk mengecam suspek dengan menyentuh bahu kedudukan suspek' are absent or not included in P19 which is a standard form for ID parade.

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A [36] The position of ID parade evidence is well settled. I refer to the following cases. I will start with *Low Kian Boon & Anor v. PP* [2010] 5 CLJ 489:

[33] In *Malkhansingh v. State of Madhya Pradesh* [2003] Cr LJ 3535 at p. 3538, BP Singh J delivering the judgment of the Indian Supreme Court said:

B It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of s 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this court. The facts, which establish the identity of the accused persons, are relevant under s. 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. C the evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are D strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure, which obliges the investigating agency to hold, or E confers a right upon the accused to claim, a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by s. 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such F identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration (see *Kanta Prashad v. Delhi Administration* AIR [1958] SC 350); *Valkuntam Chandrappa & Ors v. State of Andhra Pradesh* AIR [1960] SC 1340; *Budhsen & Anor v. State of UP* AIR [1970] SC 1321 and *Rameshwar Singh v. State of Jammu and Kashmir* [1971] 2 SCC 715).

G [37] The Court of Appeal in *Nanda Kumar K Kaliapan v. PP & Another Appeal* [2015] 2 CLJ 670, held as follows:

H The holding of an ID parade is part and parcel of the investigation process carried out by the police. Evidence given by witnesses through ID parade may be used to corroborate the substantive evidence given in court on identification of an accused as the perpetrator of the crime. In this instance, reference may be made to *Budhsen & Anor v State of UP* [1970] Cri LJ 1149 SC at p 1153 where it was stated:

I ... the ID parades belong to the investigation stage. They are generally held during the course of investigation with the primary object of enabling the witnesses to identify the persons concerned in the offence, who were not previously known to them. This serves to satisfy the investigating

officers of the *bona fides* of the prosecution witnesses and also to furnish evidence to corroborate their testimony in court. Identification proceedings in their legal effect amount simply to this, that certain persons are brought to jail or some other place and make statements either express or implied that certain individuals whom they point out are persons whom they recognise as having been concerned in the crime. They do not constitute substantive evidence.

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[38] In *Arumugam Muthusamy v. PP* [1998] 3 CLJ 597; [1998] 3 MLJ 73 the Federal Court:

Dua persoalan telah dibangkitkan dalam rujukan ini, iaitu sama ada: (i) pengecaman dari kandang orang salah di mahkamah selepas selang masa yang lama tanpa mengadakan perbarisan cam boleh merupakan dasar yang mencukupi untuk sabitan; dan (b) dalam satu kes yang bersandar semata-matanya pada pengecaman dari kandang orang salah, kegagalan majistret untuk mengarah diri berkaitan dengan keterangan pengecaman visual mengikut garis panduan dalam *R v. Turnbull & Ors* [1976] 3 All ER 549 sehingga mengakibatkan sabitan berdasarkan keterangan yang tidak disokong tentang identiti dibatalkan akan membentuk salah laksana keadilan yang substansial.

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Pengecaman seorang tertuduh buat kali pertama di perbicaraan mahkamah adalah tidak diingini dan ia merupakan amalan yang baik untuk mengadakan perbarisan cam. Namun demikian, untuk memutuskan bahawa suatu perbarisan cam dalam semua keadaan mestilah dijalankan bagi mengekalkan sabitan adalah terlalu ketat. Maka, ia akan bergantung pada fakta dan keadaan tertentu setiap kes sama ada untuk mengadakan perbarisan demikian.

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[39] In *Ong Poh Cheng v. PP* [1998] 4 CLJ 1; [1998] 4 MLJ 8, the Court of Appeal held:

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It does not follow, as a matter of course, that just because the learned judge rejected the identification at the identification parade, he must of necessity also reject the dock identification of the appellant. His rejection of the evidence of the identification at the identification parade was in no way fatal to the dock identification of the appellant as the person who had committed the offences. On the facts and circumstances of this case, the court or dock identification of the appellant was rightly accepted (see p 11D-G); *Arumugam s/o Muthusamy v. PP* [1998] 3 CLJ 597; [1998] 3 MLJ 73 distinguished.

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[40] In *Abdul Rashid Abdul Wahab lwn. PP* [2016] 1 LNS 1310; [2016] MLJU 956 it was held:

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[16] Jika pengecaman dalam perbarisan pengecaman tidak boleh diterima kerana tidak mematuhi garis panduan seperti yang diujahkan oleh peguambela perayu, Mahkamah masih boleh bergantung kepada pengecaman di dalam mahkamah (dock identification) (*Ong Poh Cheng v. PP* [1998] 4 CLJ 1). SP2, SP3, SP4 telah mengecam perayu secara positif di dalam mahkamah.

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- A [41] Having read *Low Kian Boon, Nanda Kumar, Arumugam s/o Muthusamy, Ong Poh Cheng* and *Abdul Rashid bin Abdul Wahab supra*, it is my view that even if the ID parade conducted is unsatisfactory or that it did not follow the guidelines, the court can still rely on dock identification.
- B [42] What then of the notice of alibi? Are the notice of alibi marked as D1 and D2 of any help to the accused? In their alibi, the accused are saying that at the time of the alleged offence around 3.30pm on 26 November 2013, they were in a bus on the Miri-Bintulu Road somewhere after Simpang Ngu junction. But the prosecution took issue that the notice of alibi were only served on the prosecution after the COA had ordered the High Court to call the defence accused on the original charge. The prosecution also submitted that there were no names of witnesses mentioned therein in D1 and D2 as who had taken the baby to corroborate the allegation that the accused had given up their baby to this Indonesian couple at Simpang Ngu. The prosecution submitted the defence of alibi raised by both accused at the defence stage is a classic example of afterthought and a recent invention of evidence because the investigation officer (PW18) had testified at the prosecution stage that it was for the first time that he heard of the baby being given for adoption (p. 328 of the NOP). It is also the prosecution's submission that from the very beginning of the police investigation, this alleged adoption should have been stated in their cautioned statement which should have been tendered as part of their defence. I am entirely in agreement with the prosecution's submission that the alibi of the accused is an afterthought and of no help to the accused.
- F [43] From my analysis of the evidence, I therefore have no hesitation to make a finding that the prosecution had proven its case beyond reasonable doubt that it was A1 and the female person that had killed the baby. As for A2, though her DNA was found on the clothing that was to be expected after all she was the baby's mother and she had touched and cuddled her baby. From her unsworn statement, she did not want to give her baby for adoption and A1 had to take the baby by force. She was left alone to cry until A1 came back no longer with the baby. I am also of the view that A2 was not the female person with A1 at the crime scene. PW13 did not identify her at the crime scene or at the ID parade and during dock identification.
- G [44] But could she be roped in under s. 34 of the Penal Code. There are many cases decided on s. 34. In *Muhammad Isa Aris & Ors v. PP* [2011] 3 CLJ 510; [2011] 5 MLJ 342, it was held: '... It is statutorily recognised that if more than two persons intentionally commit a crime together, it is as if each of them committed the crime individually. It falls squarely within the concept of joint liability in committing the criminal offence based on common intention. Thus, an individual accused person is held to be responsible for the criminal acts done by several persons in furtherance of
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common intention of all irrespective of the role played by each accused person in the perpetration of the offence. It is a question of facts on every case in order to determine the existence of common intention. Section 34 of the Penal Code would bite even if the wrongdoer is absent from the scene of crime'. In *Rex v. Vincent Banka & Anor* [1936] 1 LNS 62; [1936] 1 MLJ 53, court states: '... there must exist a common intention to commit the crime actually committed and it is not sufficient that there should be merely a common intention to 'behave criminally'.' In *Abu Bakar Imam Idris v. PP* [1947] 1 LNS 1; [1947] 1 MLJ 133b, it was held: '... it is clear to Their Lordships that common intention within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. But as has often been observed, it is difficult if not impossible to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case'. In *Lee Kwai Heong & Anor v. PP* [2006] 1 CLJ 1043; [2006] 2 MLJ 528 the Court Appeal held: '... the crucial ingredient to prove common intention is the existence of pre-concert or pre-planning which may develop on the spot or during the course of commission of the offence. The crucial test is that such plan must precede the act constituting an offence'.

[45] It is therefore clear from those cases referred, that the prosecution must establish that there was a pre-arranged plan to commit a criminal act and that the crime forming the subject matter of the charge was done in concert pursuant to that pre-arranged plan which may develop on the spot or during the course of commission of the offence. The crucial test is that such plan must precede the act constituting an offence. But as often been observed, it is difficult if not impossible to procure direct evidence to prove the intention of an individual, thus in most cases, such evidence has to be inferred from his act or conduct or other relevant circumstances of the case. It is a question of facts on every case in order to determine the existence of common intention.

[46] Now, have the prosecution proven common intention? I do not think so. There is no evidence showing the existence of pre-concert or pre-planning bearing in mind that the crucial test is that such plan must precede the act constituting an offence. The evidence showed A2 did not want to give her baby for adoption. It was A1 who had taken the baby from A2 by force. The evidence support my view that A1 was identified by PW13 at the crime scene and A1 alone was responsible for the death of the baby.

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- A [47] For the above reasons, I find that the defence put forward by A1 had failed to create any reasonable doubt in the prosecution's case but the prosecution had succeeded in proving its case against A1 as per the charge beyond reasonable doubt at the end of the defence case. I therefore find A1 guilty and convicted as per the charge and I sentenced him to death, *to wit*
- B to be hanged by the neck till death. In respect of A2, I find that she had raised a reasonable doubt on the charge preferred against her. I therefore acquit and discharge A2 of the said charge.
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